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## *Yoshida International, Inc. v. United States: Was the 1971 Import Surcharge Legally Imposed?*

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***Yoshida International, Inc. v. United States: Was the 1971  
Import Surcharge Legally Imposed?***

On August 15, 1971, President Nixon announced the imposition of a ten per cent ad valorem surcharge on all dutiable imports.<sup>1</sup> Ac-

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1. Pres. Proc. No. 4074, 85 Stat. 926 (1971). The Proclamation stated in relevant part:

WHEREAS, there has been a prolonged decline in the international monetary reserves of the United States, and our trade and international competitive position is seriously threatened and, as a result, our continued ability to assure our security could be impaired;

WHEREAS, the balance of payments position of the United States requires the imposition of a surcharge on dutiable imports;

WHEREAS, pursuant to the authority vested in him by the Constitution and the statutes, including, but not limited to, the Tariff Act of 1930, as amended (hereinafter referred to as "the Tariff Act"), and the Trade Expansion Act of 1962 (hereinafter referred to as "the TEA"), the President entered into, and proclaimed tariff rates under, trade agreements with foreign countries;

WHEREAS, under the Tariff Act, the TEA, and other provisions of law, the President may, at any time, modify or terminate, in whole or in part, any proclamation made under his authority;

NOW, THEREFORE, I, RICHARD NIXON, President of the United States of America, acting under the authority vested in me by the Constitution and the statutes, including, but not limited to, the Tariff Act, and the TEA, respectively, do proclaim as follows:

A. I hereby declare a national emergency during which I call upon the public and private sector to make the efforts necessary to strengthen the international economic position of the United States.

B. (1) I hereby terminate in part for such period as may be necessary and modify prior Presidential Proclamations which carry out trade agreements insofar as such proclamations are inconsistent with, or proclaim duties different from, those made effective pursuant to the terms of this Proclamation.

(2) Such proclamations are suspended only insofar as is required to assess a

cording to the President, the surcharge was necessary because an overvaluation of United States currency had created a situation in which United States imports were increasing faster than exports,<sup>2</sup> contributing to a balance of payments deficit.<sup>3</sup>

To correct the overvaluation, the President could have unilaterally devalued the dollar,<sup>4</sup> thus effecting a realignment of exchange rates. However, there was some concern that such an action by the United States would lead to similar devaluations by other countries,<sup>5</sup> thereby negating any benefits the United States would derive from its devaluation. Therefore, the President chose to impose the surcharge as a temporary measure to slow the rising tide of imports and to encourage other countries to negotiate a realignment of exchange rates.<sup>6</sup> When a realignment agreement was reached in December 1971,<sup>7</sup> the President terminated the surcharge,<sup>8</sup> reestablishing the rates of duty that were in effect on August 15, 1971.

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surcharge in the form of a supplemental duty amounting to 10 per cent ad valorem. Such supplemental duty shall be imposed on all dutiable articles imported into the customs territory of the United States from outside thereof, which are entered, or withdrawn from warehouse, for consumption after 12:01 a.m., August 16, 1971, provided, however, that if the imposition of an additional duty of 10 per cent ad valorem would cause the total duty or charge payable to exceed the total duty or charge payable at the rate prescribed in column 2 of the Tariff Schedules of the United States, then the column 2 rate shall apply.

Pres. Proc. No. 4074 was terminated in December 1971. See text at notes 7-8 *infra*.

The United States Tariff Schedule lists two tariff rates, known as the "column one" and "column two" rates, for many items. 19 U.S.C. § 1202 (1970). The column two rates are statutory rates. Most of these rates were enacted in 1930 as part of the Smoot-Hawley Tariff Act, ch. 497, 46 Stat. 590. The column one rates are rates that either have been proclaimed by the executive, e.g., Pres. Proc. No. 3822, 82 Stat. 1455 (1968), or have been declared proclaimed rates by Congress. E.g., Act of July 9, 1969, Pub. L. No. 91-41, 83 Stat. 44.

Pres. Proc. No. 4074 provided that the column two rate was the maximum tariff rate that could be imposed on an imported item. Thus, the Proclamation either imposed the statutory rate or established an intermediate rate between the rate in effect on August 15, 1971, and the statutory rate, as illustrated in the Table:

	Column 1 Rate	Column 2 Rate	Rate After Surcharge
Corn	15%	25%	25%
Grain	20%	25%	25%
Soybeans	10%	25%	20%

2. HOUSE COMM. ON BANKING AND CURRENCY, 92D CONG., 2D SESS., BACKGROUND MATERIAL ON LEGISLATION MODIFYING THE PAR VALUE OF THE DOLLAR 23 (Comm. Print 1972) [hereinafter BACKGROUND MATERIAL].

3. The projected trade account in August 1971 showed an annual deficit of \$2 billion for that year, and a deficit of \$3 billion to \$4 billion for 1972. *Id.* For a general discussion of balance of payments, see R. LIPSEY & P. STEINER, *ECONOMICS* 680-88 (2d ed. 1969); P. SAMUELSON, *ECONOMICS* 621-45 (7th ed. 1967). For a discussion of the relationship between overvaluation of currency and balance of payments deficits, see P. ELLSWORTH, *THE INTERNATIONAL ECONOMY* 332-33 (4th ed. 1969).

4. See P. SAMUELSON, *supra* note 3, at 643.

5. BACKGROUND MATERIAL, *supra* note 2, at 29.

6. N.Y. Times, Aug. 18, 1971, at 1, col. 6 (late city ed.).

7. See BACKGROUND MATERIAL, *supra* note 2, at 29.

8. Pres. Proc. No. 4098, 86 Stat. 1591 (1972).

The Constitution gives to Congress, not to the executive, the power to set tariff rates and regulate foreign trade.<sup>9</sup> Thus, unless Congress delegated this power to the executive,<sup>10</sup> President Nixon's action in imposing the surcharge was *ultra vires*.

In *Yoshida International, Inc. v. United States*,<sup>11</sup> an importer affected by the surcharge alleged that President Nixon had not been given the authority to impose it. The President claimed that the Tariff Act of 1930 as amended,<sup>12</sup> the Trade Expansion Act of 1962,<sup>13</sup> and section 5(b) of the Trading with the Enemy Act<sup>14</sup> all provided a legal basis for his action.<sup>15</sup> The United States Customs Court held that none of the acts cited by the President granted him the authority to impose the surcharge and hence ordered the government to pay a rebate to the importers.<sup>16</sup> This Note examines the court's decision, and concludes that, although the President's action cannot be justified under the Trading with the Enemy Act, it can be upheld under the Tariff Act of 1930 and the Trade Expansion Act of 1962.

9. U.S. CONST. art. I, § 8. Historically, Congress has exercised these powers. See K. MACKENZIE, *TARIFF-MAKING AND TRADE POLICY IN THE U.S. AND CANADA* 1-25 (1968); F. TAUSSIG, *THE TARIFF HISTORY OF THE UNITED STATES* (8th ed. 1931).

10. It might be argued that President Nixon had the "inherent" power to impose the surcharge by virtue of art. 2, § 1, of the Constitution, which states that "[t]he executive Power shall be vested in a President." See Pres. Proc. No. 4074, 85 Stat. 926 (1971), stating that the surcharge was imposed by the President "pursuant to the authority vested in him by the Constitution . . . ."

This inherent powers theory, first espoused by Alexander Hamilton (see E. CORWIN, *THE PRESIDENT* 177-84 (4th ed. 1957); L. HENKIN, *FOREIGN AFFAIRS AND THE CONSTITUTION* 42 (1972)), was advanced by Justice Sutherland in *United States v. Curtiss-Wright Export Corp.*, 299 U.S. 304, 320 (1936), to support President Roosevelt's claim of broad discretionary authority in the field of international relations. However, even proponents of the theory have recognized that whatever powers are inherent in the phrase "executive Power" must still be interpreted "in conformity with other parts of the Constitution." E. CORWIN, *THE PRESIDENT'S CONTROL OF FOREIGN RELATIONS* 10-12 (1917). The Constitution specifically delegates to Congress the power to "lay and collect Taxes, Duties, Imposts and Excises" and "to regulate Commerce with Foreign Nations." U.S. CONST. art. I, § 8. Therefore, because the surcharge was an additional import duty, its imposition cannot be upheld on the basis of the powers inherent in the executive office. See *United States v. Guy W. Capps, Inc.*, 204 F.2d 655, 659 (4th Cir. 1953), *aff'd.*, 348 U.S. 296 (1955), holding that the inherent powers of the President do not include the power to regulate interstate and foreign commerce.

11. 378 F. Supp. 1155 (Cust. Ct. 1974).

12. The President was relying specifically on section 350(a) of the Tariff Act of 1930, 19 U.S.C. § 1351(a)(6) (1970). See text at note 53 *infra*.

13. 19 U.S.C. §§ 1801-991 (1970).

14. 50 U.S.C. app. § 5(b) (1970).

15. The Tariff Act of 1930, 19 U.S.C. §§ 1202-654 (1970), and the Trade Expansion Act of 1962, 19 U.S.C. §§ 1801-991 (1970), were specifically cited by the President in Pres. Proc. No. 4074, 85 Stat. 926 (1971), as authority for the imposition of the surcharge. See note 1 *supra*. In arguing its case before the Customs Court, the executive department also relied on the Trading with the Enemy Act, 50 U.S.C. app. §§ 1-44 (1970). See Brief for Defendant at 55-67, *Yoshida Intl., Inc. v. United States*, 378 F. Supp. 1155 (Cust. Ct. 1974) [hereinafter Brief for Defendant].

16. The government could be forced to refund as much as \$500 million to importers, if the President's action was illegal. N.Y. Times, July 9, 1974, at 1, col. 5 (late city ed.).

Section 5(b) of the Trading with the Enemy Act currently provides that "[d]uring the time of war or during any other period of national emergency declared by the President," the Chief Executive may, "by means of instructions, licenses, or otherwise . . . regulate . . . prevent or prohibit . . . importation . . . of . . . any property in which any foreign country or a national thereof has any interest."<sup>17</sup>

When the Trading with the Enemy Act was first enacted in 1917 its scope was restricted to wartime.<sup>18</sup> During the domestic banking crisis of 1933 the act was expanded to encompass "any other period of national emergency declared by the President."<sup>19</sup> It was later held that this expansion was not limited to the banking crisis, but authorized the President to act in any declared emergency.<sup>20</sup>

As originally passed by the House in 1917, the Act did not grant the President the power to regulate imports.<sup>21</sup> Subsequently, the Senate added, and the House approved, section 11, specifically authorizing the President to regulate or prohibit, by proclamation, the importation of any article from any country "during the present war."<sup>22</sup> At the close of World War I this authorization, unlike that of section 5(b), terminated, and it has never been reenacted. In 1941, an amendment to section 5(b) added, *inter alia*, "importation" of goods to the list of activities that could be regulated "by means of instructions, licenses, or otherwise."<sup>23</sup>

Presidential Proclamation 4074 contains a declaration of national emergency<sup>24</sup> thereby complying with that statutory requirement.<sup>25</sup> And, on its face, the Act does authorize the President to regulate imports. However, a closer examination of the Trading with the

17. 50 U.S.C. app. § 5(b) (1970).

18. Act of Oct. 6, 1917, ch. 106, 40 Stat. 411.

19. Act of March 9, 1933, ch. 1, tit. 1, § 2, 48 Stat. 1. The title of the Act read "An act to provide relief in the existing national emergency in banking, and for other purposes."

20. See *Pike v. United States*, 340 F.2d 487 (9th Cir. 1965).

21. See 55 CONG. REC. 7012 (1917) (remarks of Senator Ransdell).

22. 50 U.S.C. app. § 11 (1970). The provision states:

§ 11. Importations prohibited.

Whenever during the present war the President shall find that the public safety so requires and shall make proclamation thereof it shall be unlawful to import into the United States from any country named in such proclamation except at such time or times, and under such regulations or orders, and subject to such limitations and exceptions as the President shall prescribe, until otherwise ordered by the President or by Congress: *Provided, however*, That no preference shall be given to the ports of one State over those of another.

23. Act of Dec. 18, 1941, ch. 593, tit. 3, § 301, 55 Stat. 839. The word "instructions" was also added by this amendment.

24. See note 1 *supra*.

25. Courts will not review a declaration of national emergency because such action is "so peculiarly within the province of the chief executive . . ." *Sardino v. Federal Reserve Bank*, 361 F.2d 106, 109 (2d Cir.), *cert. denied*, 385 U.S. 898 (1966). See also *Yoshida Intl., Inc. v. United States*, 378 F. Supp. 1155, 1170 (Cust. Ct. 1974).

Enemy Act reveals that this statute does not give the executive the power to impose a surcharge.

The fact that Congress, in 1917, severely limited the authorization to regulate imports by restricting it to the duration of World War I indicates that Congress viewed this as an extraordinary grant of power, justified only in extreme circumstances. If, by adding "importation" to section 5(b) in 1941, Congress intended to once again delegate such sweeping authority to the President without limiting its use to wartime, it seems likely that evidence of this intent would appear in the legislative history. In fact, there is no history indicating why "importation" was added. Moreover, the addition of this word was only a minor change in a much larger revisionary scheme, aimed solely at "giv[ing] the President the power to actively put into operation those interests or those securities or plants that might be taken over and be seized under authority of 5(b)."<sup>26</sup> Thus, there is no evidence that by adding the word "importation" in the Trading with the Enemy Act, Congress intended to delegate to the executive the expansive power exercised by President Nixon in imposing the surcharge.

In light of the expansion of the Trading with the Enemy Act to cover any national emergency, a broad interpretation of the importation provision would allow the President to subvert the entire tariff structure. By merely declaring a state of national emergency the President could set tariff rates free from the limitations imposed by the Tariff Act of 1930 and the Trade Expansion Act of 1962.<sup>27</sup> If the declared national emergency involved the kind of extraordinary circumstances surrounding the 1933 banking crisis, such action by the President might be justified. However, in the absence of judicial review of a declaration of national emergency,<sup>28</sup> there is no way to determine if such circumstances are present. Past practices indicate that declarations of national emergency are no longer reserved for crisis situations. In fact, such a declaration has been in effect in the United States since 1950.<sup>29</sup> Thus, in order to preserve the integrity of the trade acts, it is necessary to interpret narrowly the President's power to regulate imports under section 5(b).

Section 5(b)(1)(A) authorizes the President to regulate "foreign exchange, transfers of credit or payments between, by, through, or to any banking institution, and the importing [and] exporting . . . of

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26. 87 CONG. REC. 9865 (1941) (remarks of Representative Kefauver).

27. In his concurring opinion in *Yoshida*, Judge Maletz recognized that Congress, in its debates on the tariff statutes, never indicated that the President already had emergency rate-making authority under the Trading with the Enemy Act. 378 F. Supp. at 1183.

28. See note 25 *supra*.

29. There has been a declared state of national emergency in the United States since President Truman issued Pres. Proc. No. 2914, 64 Stat. A454 (1950).

gold or silver coin or bullion, currency or securities . . . ."<sup>30</sup> Because the importation of foreign products necessarily involves foreign exchange, exportation of currency, and transfers of credit and money between banking institutions, the President claimed that this provision supported the imposition of the surcharge. The President compared the surcharge to the Foreign Direct Investment Regulations<sup>31</sup> established by President Johnson in 1968, claiming that both were directed at regulating the outflow of dollars from the United States.<sup>32</sup>

There is a fundamental difference between the action taken by President Johnson and that taken by President Nixon. President Johnson placed direct controls on the outflow of American currency. The surcharge only indirectly affected that outflow. The statute authorizes direct controls. If it is interpreted to allow the President to regulate any activity which may ultimately affect international monetary transactions, there would be few internal commercial activities which could not be regulated under this provision.

Finally, it is necessary to consider whether the surcharge was a proper mode of regulation under the provisions of the Trading with the Enemy Act. The statute currently authorizes the President to act only "by means of instructions, licenses, or otherwise."<sup>33</sup>

The 1917 Act was modeled on a statute enacted during the Civil War prohibiting all trade with the insurrectionary states but providing "[t]hat the President may, in his discretion, license and permit commercial intercourse. . . ."<sup>34</sup> Under the Civil War statute, the Supreme Court clearly distinguished the President's power to issue licenses from "the power to levy and collect taxes, duties, and excises."<sup>35</sup> By using this same "licensing" language in the 1917 Act, it is reasonable to assume that Congress intended to keep this distinction intact.<sup>36</sup> There is no legislative history indicating what Congress intended by the inclusion of "instructions" in the provision.<sup>37</sup> However,

30. 50 U.S.C. app. § 5(b)(1)(A) (1970).

31. Exec. Order No. 11387, 3 C.F.R. 192 (1974).

32. See Brief for Defendant, *supra* note 15, at 58-61. President Johnson's promulgation of the foreign investment regulations was motivated by the executive department's fear that "[a] continued substantial excess of dollar outflows over dollar inflows could undermine the value of the dollar in international commerce." 42 OP. ATT. GEN. No. 35, at 9 (1968). President Nixon, in imposing the surcharge, was motivated by a similar fear. See Pres. Proc. No. 4074, 85 Stat. 926 (1971); Brief for Defendant, *supra* note 15, at 60.

33. 50 U.S.C. app. § 5(b)(1) (1970).

34. Act of July 13, 1861, ch. 3, § 5, 12 Stat. 257.

35. *Hamilton v. Dillin*, 88 U.S. (21 Wall.) 73, 97 (1875).

36. See 2A J. SUTHERLAND, STATUTES AND STATUTORY CONSTRUCTION § 49.09 (4th ed. C. Sands 1973): "[W]here the legislature adopts a legislative expression which has received judicial interpretation, such interpretation will be prima facie evidence of the legislative intent."

37. "Instructions" was added to section 5(b) in 1941. See note 23 *supra*.

it is likely that "instructions" encompasses regulations such as those dealing with American investments abroad issued by President Johnson.<sup>38</sup>

Since Congress specified "instructions" and "licenses" as permissible regulatory devices, the term "otherwise" should only be interpreted to encompass similar methods of regulation.<sup>39</sup> If Congress had intended to give the President unlimited discretion in choosing the mode of regulation, it could have done so explicitly.<sup>40</sup> Moreover, regulating by imposing a surcharge is not "similar" to regulating by issuing instructions or licenses. The latter method establishes guidelines for engaging in the regulated activity; the former exacts a higher fee for, but does not set standards governing, the regulated activity. The Trading with the Enemy Act established an exception to the common-law principle that all commercial intercourse between warring nations ceases.<sup>41</sup> Though the scope of the act was later expanded,<sup>42</sup> the statute should not be used as a method of setting tariffs, nor as an instrument for fine-tuning the economy.

The Tariff Act of 1930 as amended, and the Trade Expansion Act of 1962 were specifically cited in Presidential Proclamation 4074 as authority for the imposition of the surcharge.<sup>43</sup> These two statutes in fact provide the legal basis for the President's action.

Congress first delegated to the President the authority to enter into foreign trade agreements in the 1934 amendment<sup>44</sup> to the Tariff Act of 1930. The delegation of authority contained in this amendment was periodically renewed until 1962, when Congress enacted the Trade Expansion Act.<sup>45</sup> The major operative provisions of the

38. See text at notes 31-32 *supra*. Although regulations promulgated under the Trading with the Enemy Act occasionally have been challenged substantively, it has always been assumed that these regulations were proper procedurally under the language of section 5(b). See, e.g., *Pike v. United States*, 340 F.2d 487 (9th Cir. 1965); *United States v. Quong*, 303 F.2d 499 (6th Cir. 1962); *United States v. Broverman*, 180 F. Supp. 631 (S.D.N.Y. 1959).

39. See 2A J. SUTHERLAND, *supra* note 36, § 47.17: "Where general words follow specific words in an enumeration describing the legal subject, the general words are construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words." (Footnotes omitted.)

40. See 2A J. SUTHERLAND, *supra* note 36, § 47.17: "[H]ad the legislature intended the general words to be used in their unrestricted sense, it would have made no mention of the particular words, but would have used 'only one compendious' expression." (Footnotes omitted.)

41. The purpose of the Trading with the Enemy Act was "to mitigate the rules of law which prohibit all intercourse between the citizens of warring nations, and to permit, under careful safeguards and restrictions, certain kinds of business to be carried on." S. REP. NO. 111, 65th Cong., 1st Sess. 1 (1917).

42. See text at notes 18-20 *supra*.

43. See note 1 *supra*.

44. The Trade Agreements Act of 1934, ch. 474, 48 Stat. 943.

45. Act of Oct. 11, 1962, Pub. L. No. 87-794, 76 Stat. 872 (codified at 19 U.S.C. §§ 1801-991 (1970)). The negotiating authority delegated under the Trade Expansion Act expired on July 1, 1967. In 1974, Congress enacted the Trade Act, Pub. L. No. 93-618, 88 Stat. 1978, which again delegates negotiating authority to the executive.



1962 Act mirrored those of the original Tariff Act as amended. Both statutes empowered the President to negotiate tariff agreements whenever he found that "any existing duties or other import restrictions of the United States or any foreign country [were] unduly burdening and restricting the foreign trade of the United States. . . ."<sup>46</sup> However, the President's power was limited. He could not raise or lower the duty by more than a specified percentage of the tariff in existence on a particular date chosen by Congress as a base.<sup>47</sup> He also could not transfer items between the duty list and the free list.<sup>48</sup>

The delegation of negotiating authority to the President under these statutes was bifurcated in form.<sup>49</sup> Although the President was authorized to enter into foreign trade agreements, the agreements were not self-executing. In order for them to become effective as domestic law, the President had to proclaim whatever modifications of existing duties or import restrictions were necessary or appropriate to carry out the agreements.<sup>50</sup> These proclamations could be terminated "in whole or in part"<sup>51</sup> without abrogating the underlying trade relationships.<sup>52</sup> President Nixon claimed that the imposition of the surcharge was a valid exercise of his power to terminate proclamations "in part."<sup>53</sup>

46. Tariff Act of 1930, § 350(a), 19 U.S.C. § 1351(a)(1) (1970). Similar language can be found in section 201(a) of the Trade Expansion Act, 19 U.S.C. § 1821(a) (1970).

47. Tariff Act of 1930, § 350(a)(2), 19 U.S.C. §§ 1351(a)(2)(A), (a)(2)(D), (a)(4)(A) (1970); Trade Expansion Act of 1962, § 201(b), 19 U.S.C. § 1821(b) (1970). Sections 101(b) and (c) of the Trade Act of 1974, Pub. L. No. 93-618, 88 Stat. 1978, contain similar restrictions on the President's negotiating authority.

48. Tariff Act of 1930, § 350(a)(2), 19 U.S.C. § 1351(a)(2)(B) (1970). Both the Trade Expansion Act, § 201(a)(2), 19 U.S.C. § 1821(a)(2) (1970), and the Trade Act of 1974, § 101(a)(2), Pub. L. No. 93-618, 88 Stat. 1978, provide that the President may proclaim "such continuance of existing duty-free or excise treatment . . . as he determines to be required or appropriate to carry out any . . . trade agreement." These acts do not give him the authority to carry out agreements by transferring items between the two lists.

49. See Jackson, *The General Agreement on Tariffs and Trade in United States Domestic Law*, 66 MICH. L. REV. 249, 260 (1967); S. REP. NO. 258, 78th Cong., 1st Sess. 48 (1943).

50. Tariff Act of 1930, § 350(a)(2), 19 U.S.C. § 1351(a)(1)(B) (1970); Trade Expansion Act of 1962, § 201(a)(2), 19 U.S.C. § 1821(a)(2) (1970). See Jackson, *supra* note 49, at 281-85; S. REP. NO. 258, *supra* note 49, at 48.

51. Section 255(b) of the Trade Expansion Act, 19 U.S.C. § 1885(b) (1970), provides that "[t]he President may at any time terminate, in whole or in part, any proclamation" made pursuant to his negotiating authority. See Tariff Act of 1930, § 350(a)(2), 19 U.S.C. § 1351(a)(6) (1970). Unlike the power to negotiate trade agreements, see note 45 *supra*, the power to terminate proclamations under the Trade Expansion Act did not expire in 1967.

52. The President does have the power to terminate trade agreements negotiated under the tariff acts. Trade Agreements Act of 1934, § 2(b), 19 U.S.C. § 1352(b) (1970); Trade Expansion Act of 1962, § 255(a), 19 U.S.C. § 1885(a) (1970). There is no percentage limitation on the increase or decrease in the tariff that results from exercising the power to terminate proclamations, see *United States v. Metropolitan Petroleum Corp.*, 42 C.C.P.A. 38 (1954), similar to the limitation imposed on the President's negotiating power. See text at note 47 *supra*.

53. The Trade Act of 1974, Pub. L. No. 93-618, 88 Stat. 1978, specifically authorizes

The Customs Court stated that the phrase "terminate, in whole or in part" granted the President the power "to nullify and bring to an end an entire proclamation" or "to specify the extent to which a prior proclamation is terminated, thereby permitting a portion thereof to remain in effect."<sup>54</sup> Under this interpretation, for example, a proclamation could be partially terminated so that it would no longer apply to certain items previously covered by it. Thus, if Proclamation X had raised the duty on wheat, grain, and soybeans, Proclamation Y could terminate Proclamation X to the extent that it applied to grain.<sup>55</sup>

The court rejected an alternative interpretation of the termination provision that would have permitted the establishment of intermediate rates of duty by means of a surcharge.<sup>56</sup> Under this alternative interpretation, for example, if Proclamation Z had lowered the duty on corn from the statutory twenty per cent rate to a ten per cent rate,

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the President to impose a surcharge to correct a balance of payments deficit. Section 122 of the new act states, in part:

(a) Whenever fundamental international payments problems require special import measures to restrict imports—

(1) to deal with large and serious United States balance-of-payments deficits,

(2) to prevent an imminent and significant depreciation of the dollar in foreign exchange markets, or

(3) to cooperate with other countries in correcting an international balance-of-payments disequilibrium, the President shall proclaim, for a period not exceeding 150 days (unless such period is extended by Act of Congress)—

(A) a temporary import surcharge, not to exceed 15 per cent ad valorem, in the form of duties (in addition to those already imposed, if any) on articles imported into the United States;

(B) temporary limitations through the use of quotas on the importation of articles into the United States; or

(C) both a temporary import surcharge described in subparagraph (A) and temporary limitations described in subparagraph (B).

One could argue that the enactment of this novel provision indicated that President Nixon did not have the authority to impose the surcharge in 1971. However, it is also arguable that Congress, responding to the decision in *Yoshida*, intended only to make explicit the powers that the President already possessed under the termination provision of the Trade Expansion Act. The legislative history of the 1974 Act does not resolve this issue.

54. 378 F. Supp. at 1164-65.

If President Nixon had "nullified" an entire proclamation or a portion thereof, and had taken no further action, the tariff rate for the items affected by the termination would have automatically reverted to the "next intervening proclaimed rate," or to the statutory rate, if no intervening rate had been proclaimed. United States Tariff Schedule, headnote 4(d), 19 U.S.C. § 1202 (1970). See discussion in text at notes 80-82 *infra*.

55. The court in *Yoshida* cited Pres. Proc. No. 3762, 81 Stat. 1076 (1967), issued by President Johnson, as exemplifying this interpretation of the power to terminate "in part." 378 F. Supp. at 1165. An earlier proclamation, Pres. Proc. No. 3458, 76 Stat. 1457 (1962), had modified the effective date of previously proclaimed rate increases for many items, including sheet glass. President Johnson's proclamation terminated this latter proclamation only in so far as it applied to sheet glass.

56. The imposition of the surcharge had the effect of either establishing the statutory tariff rate or establishing an intermediate tariff rate for all imported items. See note 1 *supra*.

a new fifteen per cent rate could be established by terminating "in part" Proclamation Z. The court relied heavily on the legislative history of the Trade Expansion Act in rejecting this interpretation of the termination provision. However, neither the statutory language nor the legislative history of that Act dictates this result.

The executive version of the Trade Expansion Act,<sup>57</sup> submitted to Congress in 1962, contained the following termination provision:

The President may, at any time terminate in whole or in part, any proclamation issued under this title. Termination in part of a proclamation reducing a rate of duty may include the proclamation, as required or appropriate to carry out any trade agreement under this title or any predecessor Act, of a rate of duty higher than such reduced rate but not higher than the rate which would have been applicable if the proclamation had been terminated in whole.<sup>58</sup>

The second sentence of this provision would have explicitly authorized the establishment of intermediate rates of duty as part of the President's power to terminate proclamations. This sentence was omitted from the bill that was approved by the House Ways and Means Committee.<sup>59</sup> The Customs Court viewed this omission as evidence that Congress did not intend that the President have this power.<sup>60</sup> However, congressional debates and reports offer no explanation for the omission. It is possible, therefore, that the clause was omitted from the final bill because it was considered superfluous.<sup>61</sup>

In an analysis of the bill prepared by the executive department, the second sentence of the termination section was termed a "new technical provision" that "would be of use in negotiations."<sup>62</sup> This language was seen by the court as indicating that even the executive department thought that the proposed provision granted the President a new, substantive power.<sup>63</sup> However, by describing the delegation of explicit authority to set intermediate rates as a "new technical provision," the executive analysis implies that the proposal was not a substantive change or addition to the President's power, but a mere

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57. H.R. No. 9900, 87th Cong., 2d Sess. (1962).

58. *Hearings on H.R. 9900 Before the House Comm. on Ways and Means*, 87th Cong., 2d Sess. 17 (1962) [hereinafter *House Hearings*].

59. H.R. No. 11970, 87th Cong., 2d Sess. (1962)

60. 378 F. Supp. at 1165-66.

61. See 2A J. SUTHERLAND, *supra* note 36, § 48.18, for the proposition that the defeat of a proposed amendment to a bill may indicate either that the subject matter of the proposal has been rejected; or that it has already been included in the bill "in substance."

62. *House Hearings*, *supra* note 58, at 37. The report stated that "[s]uch authority would be of use in negotiations under article XXVIII of the General Agreement on Tariffs and Trade . . . where it is occasionally desirable to agree to make increases in rates of duty." *Id.*

63. 378 F. Supp. at 1165-66.

clarification of powers already included in the termination authority.<sup>64</sup>

In an analogous situation, the executive department once interpreted a similar termination provision as delegating presidential discretion in the tariff area.<sup>65</sup> In 1950, the statutory import duty on

64. It is clear that, under the termination provision, President Nixon had the power to abrogate completely the last round of trade agreements by terminating in whole the proclamations issued pursuant to those agreements. Thus, by terminating those proclamations in part and establishing intermediate rates, he was arguably exercising a lesser power than his power to terminate in whole.

The Customs Court rejected this argument, claiming that the presidential discretion involved in establishing intermediate rates is a greater exercise of power than merely terminating proclamations, where the rate will automatically revert to a prior rate. 378 F. Supp. at 1164. However, the court failed to distinguish an absolute grant of discretion from one that is limited. Clearly, a delegation of authority that allowed the President to exercise unbounded discretion would be a greater grant of power than a delegation that, when exercised, was governed by automatic rules. But, in this instance, the President's exercise of discretion was inherently limited by the statutory rates. To illustrate: Assume that, for a single item, there is a set statutory rate of 15 per cent, a prior proclaimed rate of 12 per cent, and a presently enforced proclaimed rate of 10 per cent. According to the court, *see* text at notes 80-81 *infra*, the President could terminate the 10 per cent rate, and either revive the 12 per cent rate or change the order of reversion and reestablish the 15 per cent rate. The President maintained that he could terminate the proclamation that lowered the rate by 2 per cent (*i.e.*, from 12 per cent to 10 per cent) in part, that is, to the extent of 1 per cent. The resulting rate would be 11 per cent. Thus, the effect of the President's action would be the imposition of a 1 per cent ad valorem surcharge on the item in question. The President recognized that under this interpretation he could never impose, for example, a 6 per cent surcharge, because the resulting rate would be 16 per cent—a rate higher than the statutory maximum.

The court's concern that the President's interpretation of the termination in part provision would allow the President to exercise greater power than he can exercise under the termination in whole provision thus arises from an overly technical interpretation of presidential "discretion." Under either interpretation of the termination in part provision, the President's exercise of discretion is limited by the statutory ceiling.

65. In its brief, Brief for Defendant, *supra* note 15, at 30-31, the government cited another example of a proclamation that terminated in part a prior proclamation, resulting in an increase in tariff rates: In 1951, President Truman issued Pres. Proc. No. 2929, 65 Stat. C12 (1951), making the tariff rates agreed upon in the Torquay Protocol to the General Agreement on Tariffs and Trade (GATT), April 21, 1951, 3 U.S.T. 588, T.I.A.S. No. 2420, 142 U.N.T.S. 34, effective as domestic law. Part three of this proclamation terminated in part the proclamation (Pres. Proc. No. 2761A, 61 Stat. 1103 (1947)) that had made effective the original GATT rates to the extent that it subjected certain items to the new rates established under the Torquay Protocol. These new rates were higher than the previous GATT rates, but lower than the statutory rates. The Customs Court, relying on *United States v. Aris Gloves, Inc.*, 48 C.C.P.A. 126 (1961), found that President Truman's proclamation merely instituted a new trade agreement, and did not independently terminate in part a prior proclamation. 378 F. Supp. at 1167.

In *Aris*, an importer affected by the rates set forth in the Torquay Protocol challenged the validity of that protocol as a "trade agreement," claiming that the government had neglected to give notice of intent to negotiate as required under the tariff acts. The court held that the Torquay Protocol was effective as a new trade agreement, since it found that in fact notice had been given. 48 C.C.P.A. at 129. This holding, however, does not answer the question whether the rate increase proclaimed by President Truman would have been effective as a termination of the GATT proclamation, if the Torquay Protocol had not been found to be an independent trade agreement.

Irish potatoes was seventy-five cents per one hundred pounds.<sup>66</sup> Under the General Agreement on Tariffs and Trade,<sup>67</sup> some potatoes were dutiable at thirty-seven and a half cents.<sup>68</sup> President Truman, exercising his power to terminate proclamations in part,<sup>69</sup> reduced the number of potatoes that could be imported at the lower rate,<sup>70</sup> thus subjecting more potatoes to the higher statutory duty.

Exposing more potatoes to the higher rate of duty raised the average rate that was imposed on imported potatoes.<sup>71</sup> By successively lowering the quota, the President could expose more and more potatoes to the higher rate, and thus increase the average rate. Ultimately, he could reduce the quota to zero, exposing all imported potatoes to the higher statutory rate.

The plenary power to change the quota parallels the power to establish intermediate rates of duty. The former power modifies the average rate,<sup>72</sup> while the latter alters the actual rate imposed. Both powers involve the exercise of broad discretion that impacts directly on tariff rates, and the exercise of both powers is limited by the statutory rates.

66. 19 U.S.C. § 1001, para. 771 (1940). The statutory rate for Irish potatoes has remained the same. 19 U.S.C. § 1202, item 137.20 (1970).

67. GATT, 61 Stat. pts. 5, 6, at A3, 55 U.N.T.S. 194 (1947). GATT has been extensively amended and modified. For a list of "official" GATT agreements through Oct. 15, 1967, see Jackson, *supra* note 49, at 319-31.

68. GATT, Schedule 20, pt. 1, item 771, 61 Stat. A1157 (1947).

69. See Pres. Proc. No. 2901, 64 Stat. A427, A429-30 (1950). Paragraph 4 of this proclamation stated: "WHEREAS, on April 3, 1950, by a decision of the contracting parties to the said General Agreement, acting jointly . . . the obligations of the United States . . . were waived . . ." 64 Stat. at A428. Relying on this language, the importer in *Yoshida* claimed that the change in the import quota had been accomplished by President Truman by means of a GATT waiver, rather than by terminating a prior proclamation in part. See Reply Brief for Plaintiff at 26, *Yoshida Intl., Inc. v. United States*, 378 F. Supp. 1155 (Cust. Ct. 1974) [hereinafter Reply Brief]. Arguing that the GATT waiver was in essence a new trade agreement, the importer contended that President Truman had properly exercised his authority to enter into trade agreements and proclaim such modifications necessary to make the agreements effective domestically. Reply Brief, *supra*, at 26-28. See text at notes 49-50 *supra*.

Contrary to the importer's contention, however, a GATT waiver is not a new trade agreement. If President Truman had failed to obtain a GATT waiver, his proclamation reducing the quota for potatoes still would have been effective as domestic law. The waiver merely prevented the United States from violating its international obligations. See J. JACKSON, *WORLD TRADE AND THE LAW OF GATT* 734-35 (1969).

70. Pres. Proc. No. 2901, 64 Stat. A427 (1950).

71. In its brief in *Yoshida*, the executive department claimed that "by decreasing the quantity of potatoes that would have been eligible for the quota rate . . . the President proclaimed a rate which was less favorable than the GATT rate but more favorable than the statutory rate." Brief for Defendant, *supra* note 15, at 30. This interpretation of President Truman's action is clearly wrong, since the proclamation affected the average rate, not the actual rate, for potatoes.

The average rate of duty will never be imposed on any imported goods. Until the quota is reached, goods will be taxed at the lower rate; goods imported after the quota has been reached will be taxed at the higher rate. It is the average of these two rates that will be affected by changing the quota.

72. See note 71 *supra*.

In 1962, Congress was aware of President Truman's use of the termination power,<sup>73</sup> yet it made no attempt to restrict the scope of this power in the Trade Expansion Act.<sup>74</sup> Because the power exercised by President Truman is so similar to that exercised by President Nixon, there is little reason to assume that Congress intended to permit the former while forbidding the latter. Thus, it is reasonable to conclude that the explicit grant of authority in the proposed termination provision was omitted because Congress believed that this authority was inherent in the phrase "terminate, in whole or in part."

In 1962, the Senate adopted a provision which would have granted the President sweeping authority to impose import restrictions.<sup>75</sup> This provision, which would have explicitly permitted the President to impose a surcharge, was removed from the final Trade Expansion Act by the House-Senate conference committee.<sup>76</sup> The court relied on the rejection of this provision as additional evidence that Congress did not intend to delegate this power to the President.

The provision would have authorized the President, whenever he determined it to be in the national interest, to impose any rate of duty that he thought was necessary, even a rate above the statutory limit. He also would have had the authority under this provision to impose tariffs on duty-free articles. Thus, the section rejected by the conference committee gave the President "unlimited and undefined" power<sup>77</sup> over tariffs. In the congressional debate on this provision, Senator Byrd noted that this section contained no specific guidelines for the use of the power and did not provide adequate congressional review of presidential actions.<sup>78</sup>

The fact that Congress was unwilling to give the President the authority to impose any duty on any article, regardless of whether the item had previously been subject to a tariff, does not indicate that Congress intended to deny the President limited discretion to set intermediate rates pursuant to his termination power.<sup>79</sup> Therefore, the rejection of the Senate provision should not be used as a basis for declaring the surcharge illegal.

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73. See H.R. REP. NO. 2007, 84th Cong., 2d Sess. 129-30 (1955).

74. Compare Tariff Act of 1930, § 350(a)(2), 19 U.S.C. § 1351(a)(6) (1970), with Trade Expansion Act of 1962, § 255(b), 19 U.S.C. § 1885(b) (1970).

75. This provision would have amended section 353 of H.R. No. 11970, 87th Cong., 2d Sess. (1962). See 108 CONG. REC. 19874-75 (remarks of Senators Jackson, Holland and Williams).

76. H.R. REP. NO. 2518, 87th Cong., 2d Sess. 13 (1962).

77. 108 CONG. REC. 22182 (1962) (remarks of Senator Byrd).

78. *Id.*

79. In imposing the surcharge, President Nixon specifically acknowledged that his authority to do so was limited by the statutory rates. Pres. Proc. No. 4074, 85 Stat. 926 (1971). See note 1 *supra*.

Headnote 4(d) of the tariff schedules provides further evidence of the meaning of the termination power: "[W]henever a proclaimed rate is terminated or suspended, the rate shall revert, unless otherwise provided, to the next intervening proclaimed rate previously superseded but not terminated or, if none, to the statutory rate."<sup>80</sup> The Customs Court, citing no authority to substantiate its position, held that the phrase "unless otherwise provided" meant only that the President could change the order of reversion.<sup>81</sup> Thus, if the President had proclaimed a rate of fifteen per cent and then successively lowered it to twelve per cent and ten per cent, under this interpretation he could terminate the proclamation establishing the ten per cent rate and revive the fifteen per cent rate, bypassing the twelve per cent tariff. The most natural reading of the language of this headnote, however, indicates that Congress expected the rate to revert only when the President did not "otherwise provide."<sup>82</sup> Under this reading, imposing a surcharge would be an alternative to the automatic reversion outlined in the headnote. It is certainly arguable that Congress, by including the phrase "unless otherwise provided," intended that the President have such power.

A major reason for the court's narrow interpretation of the termination provision in *Yoshida*, was the court's belief that Congress did not intend to grant the President broad discretion to set tariffs unilaterally.<sup>83</sup> Powers granted to the President under the escape clause of the Trade Expansion Act<sup>84</sup> indicate that this belief was unfounded.

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80. 19 U.S.C. § 1202 (1970).

81. 378 F. Supp. at 1164. The court in *Yoshida* arguably could have found support for its position here in dictum appearing in *United States v. American Bitumuls & Asphalt Co.*, 246 F.2d 270 (C.C.P.A. 1957). In explaining the difference between the negotiating provision of the Tariff Act of 1930, which expressly limited the President's power to raise tariffs, see text at notes 46-48 *supra*, and the termination provision of that Act, which contained no such restrictions, see note 52 *supra*, the court in *American Bitumuls* stated: "There is a logical reason for placing a limitation on the tariff changes which may be effected by proclamations giving effect or carrying-out trade agreements but not those which merely *terminate* other proclamations, since the latter can do no more than restore rates which have already been legally established, and are thus inherently limited." 246 F.2d at 275 (emphasis original). While the statement that the President, using his power to terminate proclamations, "can do no more than" re-establish prior legal rates would seem to support a restrictive reading of headnote 4, this language can also be interpreted to mean that, although the President can exercise discretion in establishing intermediate rates under the termination provision, he may not impose a duty that is higher than prior statutory rates.

82. The court in *Yoshida* interpreted the headnote as though it read, "[W]henever a proclaimed rate is terminated or suspended, the rate shall revert to the next intervening proclaimed rate, unless otherwise provided . . ." In fact, the phrase "unless otherwise provided" modifies only "revert."

83. 378 F. Supp. at 1164-66.

84. Trade Expansion Act of 1962, § 351(a)(1), 19 U.S.C. § 1981 (1970). For a discussion of the use of the escape clause provision in trade negotiations, see S. METZGER, *TRADE AGREEMENTS AND THE KENNEDY ROUND* 43-54 (1964); Enger, *U.S. Tariff Adjustment and Adjustment Assistance*, 6 J. WORLD TRADE L. 518 (1972).

The escape clause provides that if a domestic industry believes that it has been, or will be, injured by the increased importation of foreign products due to tariff concessions in trade agreements, it can petition the Tariff Commission<sup>85</sup> to conduct an investigation. If the Commission's study verifies the complaints of the industry, the Commission recommends to the President that he impose import restrictions to remedy the injury.<sup>86</sup> Prior to 1962, the President, upon receipt of the Commission's report, was empowered only to reject the recommendation or to "make such adjustments in the rates of duty, impose such quotas, or make such other modifications *as are found and reported by the Commission*."<sup>87</sup> He could not amend the recommendation or impose a different remedy.<sup>88</sup>

In 1962, the provision governing the President's authority in escape clause proceedings was amended, allowing the President to "proclaim such increase in, or importation of, any duty or other import restriction . . . *as he determines to be necessary* to prevent or remedy serious injury."<sup>89</sup> This clearly is an expansion of the President's discretionary authority,<sup>90</sup> as he is no longer bound by the Commission's report. Although the exercise of the escape clause power is distinguishable from the exercise of the termination power,<sup>91</sup> both grant the President authority to restrict imports, and the 1962 amendment indicates that Congress has been willing to grant the President discretion in setting tariffs.<sup>92</sup>

The delegation to the President of broad powers in the tariff area has been necessitated, in part, because Congress is too large and unwieldy to conduct tariff policy effectively.<sup>93</sup> Congress is often not

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85. For a general discussion of the role of the Tariff Commission in setting tariff rates, see F. TAUSSIG, *supra* note 9, at 405-06, 481-87; Bronz, *The Tariff Commission as a Regulatory Agency*, 61 COLUM. L. REV. 463 (1961).

86. Trade Expansion Act of 1962, § 301, 19 U.S.C. § 1901 (1970).

87. Trade Agreements Extension Act of 1951, § 7(c), 65 Stat. 74 (emphasis added).

88. See *United States v. Schmidt Pritchard & Co.*, 47 C.C.P.A. 152, *cert. denied*, 364 U.S. 919 (1960).

89. Trade Expansion Act of 1962, § 351(a)(1), Pub. L. No. 87-794, 76 Stat. 872 (codified at 19 U.S.C. § 1981 (1970)) (emphasis added).

90. See 108 CONG. REC. 12048 (1962) (remarks of Representative Moore); Comment, "In Major Part"—*The New Causation Problem in the Trade-Agreements Program*, 44 TEXAS L. REV. 1331, 1335 (1966).

91. Escape clause actions are designed only to prevent or remedy injuries to domestic industries and are initiated only after the Tariff Commission has submitted a report to the President. See text at notes 85-89 *supra*. The termination power may be exercised on the President's own initiative, and its purpose is not restricted to the protection of domestic industry. See text at notes 49-52 *supra*.

92. It might be argued that, if Congress had intended to grant broad, discretionary powers to the President under the termination provision, it would have done so as explicitly as it did in the amendment to the escape clause. However, it is again possible to conclude that Congress, in 1962, believed that the language of the termination provision already gave the President broad, discretionary powers so that it was unnecessary to be more specific. Cf. note 61 *supra* and accompanying text.

93. See K. MACKENZIE, *supra* note 9, at 2-3.



able to respond quickly; the process by which a bill is enacted into law sometimes stretches over several years. By delegating authority over tariff matters to the President, "prompt and decisive" action can be taken when circumstances demand it.<sup>94</sup>

The vulnerability of Congress to the pressures of special interest groups is also a problem in the tariff area. Legislators often seek tariffs that will protect regional industry at the expense of national interests. The Smoot-Hawley Tariff Act is an example of this.<sup>95</sup> That Act raised tariffs to "unprecedented heights," strangling world trade and contributing to the economic crisis of the 1930's.<sup>96</sup> Because the President is not subject to regional pressures, Congress, in 1934, gave him the power to negotiate tariff agreements under the Trade Agreements Act.<sup>97</sup>

There is also a great need for efficient, effective, unitary action when tariff questions, balance of payments considerations, and problems of international monetary policy combine to produce international crises. Historically, Congress has been aware of this problem. Congressman Smith, speaking in support of the 1934 Trade Agreements Act, expressed the concern of many legislators that the misalignment of exchange rates was negating the United States tariff structure and damaging American industry, labor and agriculture.<sup>98</sup> In debating the 1962 trade bill, Senators Jackson and Holland outlined the interrelated problems confronting the United States.<sup>99</sup> These included tariffs, quotas, unfair trade practices and "differences in exchange, which have proved to be quite a hurdle with respect to the rebuilding by our vegetable and fruit industries of the markets which they had before World War II. . . ."<sup>100</sup>

The Senators believed that the President would be able to alleviate these problems by using the powers delegated to him in the Trade Expansion Act. Senator Jackson issued a directive to the President to "look at the problem in broad perspective, not merely from the standpoint of tariffs, but also with respect to all the other devices

94. Cf. remarks of Representative Smith, 78 CONG. REC. 5286 (1934), lauding President Roosevelt for his "prompt and decisive" action in taking the United States off the gold standard.

95. Tariff Act of 1930, 19 U.S.C. §§ 1202-654 (1970). One commentator described the passage of the Smoot-Hawley Tariff Act as follows: "The majority members of the House Ways and Means Committee and the Senate Finance Committee initially wrote the tariff bill to suit their own local and regional interests. A floor fight in the House was quelled by the log-rolling expedient of providing something for almost everyone . . . . In the Senate the relaxed rules of debate facilitated obstruction which pressured the distribution of more bounty." K. MACKENZIE, *supra* note 9, at 2-3. Mackenzie concludes that the passage of this act "completely submerged the national interest" and "discredited Congressional drafting of tariff legislation." *Id.* at 3.

96. J. MACKENZIE, *supra* note 9, at 3.

97. Pub. L. No. 316, 48 Stat. 943 (1934). See J. MACKENZIE, *supra* note 9, at 3.

98. 78 CONG. REC. 5286 (1934) (remarks of Representative Smith).

99. 108 CONG. REC. 19874 (1962) (remarks of Senators Jackson and Holland).

100. *Id.*

used to make it more difficult for our commerce, agriculture and industry to properly compete in world markets."<sup>101</sup> Thus, a narrow interpretation of the powers delegated to the executive under the Trade Expansion Act would frustrate congressional intent by denying the executive the authority to respond adequately to problems created by the interrelationship of tariff policies and "differences in exchange." Only if the Trade Expansion Act is interpreted to permit such action as the imposition of a surcharge, can the President adequately deal with the multitude of problems that prompted Congress to enact that statute.<sup>102</sup>

In *Yoshida*, the Customs Court relied on the legislative history of the Trading with the Enemy Act and the Trade Expansion Act of 1962 to conclude that President Nixon's action in imposing the ten per cent ad valorem surcharge was illegal. Although the history of the Trading with the Enemy Act supports a finding that the President's action was not authorized under that statute, a careful examination of the history of the Trade Expansion Act<sup>103</sup> reveals

101. *Id.*

Other government officials have also tied the passage of trade legislation to our balance of payments position. In submitting the executive version of the Trade Expansion Act to Congress in 1962, President Kennedy stated in part:

The growing pressures on our balance-of-payments position have, in the past few years, turned a new spotlight on the importance of increasing American exports to strengthen the international position of the dollar . . . .

Our efforts to correct our adverse balance of payments have in recent years roughly paralleled our ability to increase our export surplus . . . . If that surplus can be enlarged, as exports under our new program rise faster than imports, we can achieve the equilibrium in our balance of payments which is essential to our economic stability . . . .

*House Hearings*, *supra* note 58, at 2-3. See also *id.* at 63-72, 95 (remarks of Luther H. Hodges, Secretary of Commerce), 815-33 (remarks of C. Douglas Dillon, Secretary of the Treasury).

102. The need for "adequate authority" to deal with the multitude of interrelated problems that affect tariff decisions was stressed again in hearings on the proposed Trade Reform Act of 1973. Ambassador William Eberle, Special United States Representative for Trade Negotiations, stated: "Recurrent crises in international monetary affairs in recent years, and the massive deterioration in the United States external position testify to the need for a more effective and efficient adjustment process . . . . A comprehensive approach is required . . . . Adequate authority to take appropriate action in the trade field is an important element in any program to assure balance-of-payments equilibrium." *Hearings on H.R. 6767 Before the House Comm. on Ways and Means*, 93d Cong., 1st Sess. 365 (1973). The proposed act was enacted as the Trade Act of 1974, Pub. L. No. 93-618, 88 Stat. 1978.

103. Of course, there is always a danger in relying too heavily on legislative history to support a particular interpretation of statutory language. One Supreme Court Justice has stated that the use of legislative history in statutory construction is "not interpretation of a statute but creation of a statute." *United States v. Public Util. Commn.*, 345 U.S. 295, 319 (1953) (Jackson, J., concurring).

Even in cases where legislative history is potentially useful, the danger of its misapplication is great. See 2A J. SUTHERLAND, *supra* note 36, § 48.02:

[T]he conclusions imparted by historical data will differ according to whether they are examined in detail as so many identifiable facts or in composite to discover the overall impression which they create. The first approach conduces to an arbitrary, quantitative method of evaluation by which the conclusion wins which is supported

that this statute may indeed provide the legal basis for the imposition of the surcharge.

The nature of international trade dictates that the President have comprehensive, flexible authority to set tariff rates. Foreign powers need assurance that tariff agreements reached after prolonged negotiations with the President will not be frustrated by a recalcitrant Congress.<sup>104</sup> Moreover, presidential discretion would allow American negotiators to bargain more effectively for tariff concessions.<sup>105</sup> Without this discretion, foreign countries may be less willing to negotiate major tariff reductions, knowing that if the agreements are later terminated because the reductions were too large, the tariffs will automatically revert to the previously established higher rates.<sup>106</sup> Thus, a result upholding the President's authority to set intermediate rates under the termination provision of the Trade Expansion Act is legally sound, and would be more responsive to the realities of a world economy.<sup>107</sup>

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by the greatest *number* of facts. The latter produces qualitative judgments enlightened by a sense of history.

(Emphasis original; footnote deleted.) The Customs Court failed to appreciate the "overall impression" of the legislative history, and consequently adopted an overly narrow interpretation of the President's power under the Trade Expansion Act.

104. Such assurances are necessary in view of the fact that foreign executives generally have more power over internal trade matters than does the President, and therefore can be less restrained in their negotiations with the United States. *See, e.g., K. MACKENZIE, supra* note 9, at 55-71, for a discussion of the Canadian executive's authority in trade matters.

105. *See K. MACKENZIE, supra* note 9, at xvi; 108 CONG. REC. 12000 (1962) (remarks of Representative Curtis).

106. *See K. MACKENZIE, supra* note 9, at 45: "[A] wholesale termination of agreements would result in a return to the rates in the Hawley-Smoot tariff, which remain the statutory rates of duty and are modified only by trade agreements in force . . . [T]he United States liberal trade policy of the last thirty years is wholly dependent upon the trade agreement structure."

107. Section 122 of the Trade Act of 1974, Pub. L. No. 93-618, 88 Stat. 1978, ensures that the President's authority to impose an import surcharge will no longer be challenged. *See* note 53 *supra*. But the ultimate adjudication of *Yoshida* is still critical, not only because there are large sums of money involved, *see* note 16 *supra*, but also because of the potential impact of this case on the interpretation of future legislation involving presidential discretion in international trade.